

Fair Political Practices Commission

Memorandum

To: Chairman Randolph and Commissioners Blair, Downey, Huguenin and Remy

From: Galena West, Commission Counsel Legal Division
Luisa Menchaca, General Counsel

Re: *In re St. Croix* Opinion Request; O-04-226

Date: March 7, 2005

I. Introduction

On October 18, 2004, John St. Croix, Executive Director of the Ethics Commission City and County of San Francisco (“S.F. Ethics”), submitted to the Commission a request for advice concerning interpretation of section 1.106 of the San Francisco Campaign and Governmental Conduct Code, which has incorporated the wording of section 85501 of the Political Reform Act (“Act”).¹ On October 25, 2004, S.F. Ethics requested that the advice request be treated as a request for an opinion from the Commission on this subject. Pursuant to regulation 18320, the Executive Director issued a letter on October 25, 2004, indicating the opinion request would be granted.

The matter was presented for the Commission’s consideration at the January 20, 2005, Commission meeting where staff was directed to draft a proposed opinion. At that meeting the Commission opined that the proposed mailings would not violate section 85501 of the Act so long as the candidate sending the mailing was doing so to promote his or her own candidacy, and that the appropriate valuation method was an equal division of the mailing regardless of the ranking of the candidates. This staff memorandum, prepared pursuant to regulation 18322, discusses the issues presented by the opinion request and offers recommendations where appropriate.² The memorandum is accompanied by a draft Opinion for your review. (Appendix 1.)

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109 – 18997, of the California Code of Regulations. All further statutory references are to the Government Code, unless specified otherwise.

² This memorandum and a copy of the draft opinion have been provided to the members of the Commission, the Attorney General, the Franchise Tax Board, the Secretary of State, the opinion’s requestor and others prior to the hearing, pursuant to Commission regulations. (Regulation 18322(e).) Any interested person may submit memoranda, briefs or other relevant material no later than five days prior to the scheduled hearing. (Regulation 18322(c).) The requestor may also present oral testimony at the hearing on the request. (Regulation 18322(d).)

The following is the procedure for the adoption of opinions:

- The draft opinion must be adopted by the Commission at a public meeting. Adoption requires the concurring votes of at least three Commissioners.
- The opinion is effective upon adoption by the Commission, and must be published within 30 days after adoption. The Chairman may shorten or extend the effective date (or any of the other deadlines described in this memorandum), subject to appeal to the Commission by any interested person.
- Within 14 days after the opinion is adopted, the person(s) submitting the request, any Commissioner, or the Executive Director may petition the Commission to grant a rehearing. That petition must be in writing if it is submitted by the person(s) originally requesting the opinion. If the Commission decides to grant the petition for rehearing, it suspends the opinion pending the outcome of the rehearing.

II. Facts

San Francisco has adopted a new voting system called Ranked-Choice Voting (“RCV”) to elect candidates for Mayor, Sheriff, District Attorney, City Attorney, Treasurer, Assessor-Recorder, Public Defender, and members of the Board of Supervisors. RCV was used for the first time in the November 2004 election. RCV allows a candidate to be elected by a majority vote without the need for a separate run-off election. RCV is only used for single-seat elections (i.e., races with only one winner). Voters elect these officials by ranking three different candidates in order of preference. If any candidate receives an absolute majority of the votes, then that candidate is declared the winner. If no candidate receives an absolute majority, then the candidate who received the smallest number of first choice votes is eliminated and the voters who selected the eliminated candidate as their first choice will have their votes transferred to their second choice. The votes are then recounted, and any candidate receiving a majority is declared the winner. If no candidate has yet obtained an absolute majority of the votes, then the process of eliminating candidates and transferring votes is repeated until one candidate has an absolute majority.

Certain candidates wish to send out mailers telling voters where candidates should be placed for each of the three positions (first choice, second choice, third choice). The candidates would like to send out these mailers both individually and in cooperation with other candidates in order to apportion costs. The staff of S.F. Ethics has prepared a draft opinion letter concluding that section 1.122 of the San Francisco Campaign and Governmental Conduct Code (“S.F. Code”) permits a candidate to expend campaign funds only when the primary purpose of such expenditures is to support his or her own candidacy, or for expenses associated with holding office. Under section 1.122 of the S.F. Code, a candidate may not use campaign funds when the primary purpose of the expenditure is to urge voters to elect another candidate to public office.

The prohibition in section 85501 of the Act has been incorporated into the S.F. Code as section 1.106. S.F. Ethics asks whether the Commission would consider any expenditure for a communication by one candidate that urges voters to support that candidate as the first choice - and two others for the second and third choices – to be an independent expenditure that supports or opposes another candidate within the meaning of section 85501. S.F. Ethics also inquires on behalf of certain candidates as to how costs should be allocated if such mailings are permissible.

III. Analysis

As discussed in detail in the January Commission memorandum and the attached draft Opinion (Appendix 1), section 85501 has three main elements:

- (1) A controlled committee of a candidate;
- (2) An independent expenditure; and,
- (3) The purpose of supporting or opposing other candidates.³

Whether these elements are present in a particular case is a question of fact. The statute applies only to controlled committees of candidates. In this case, we are asked about candidates sending mailers, so their controlled committees would be involved. The second element is that the activity must be an “independent expenditure.” Both the S.F. rule and section 85501 prohibit independent expenditures which support or oppose another candidate. Independent expenditures also have three distinct elements:⁴

- (1) There must be an “expenditure” as defined by the Act;
- (2) The expenditure must fund a communication that expressly advocates the election or defeat of a clearly identified candidate; and,
- (3) The communication must not be made at the behest of the other candidate or committee (i.e., made in coordination with them).

A detailed discussion of these points is included in the attached opinion. In this case, we are discussing expenditures made for communications (mailings) that rank three candidates in an election. Therefore, the first element of an independent expenditure is

³ The full text of section 85501 is as follows: “A controlled committee of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates.”

⁴ An independent expenditure is defined in section 82031 as:

“...an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.”

present. The mailings will expressly urge the election or defeat of a clearly identified candidate; and so the second element of an independent expenditure is present.

For the third element, the general rule is that when an expenditure is coordinated with another candidate, it is made at the behest of that candidate and therefore is not an independent expenditure. (See section 85500 and regulations 18225.7 and 18550.1.) Therefore, mailings that are coordinated between the three candidates are made at the behest of the other candidates or committees (i.e., made in coordination with them) and are not prohibited by section 85501 because they are not independent expenditures.⁵

However, where one candidate is sending the mailing independently, a literal reading of the statute would indicate that the mailing would be an independent expenditure since the mailing “expressly advocates the election or defeat of a clearly identified candidate.” (Section 82031.) The third element of the prohibition in section 85501 is broader than the express advocacy component of “independent expenditure.” Basically, it states that candidates cannot use their own campaign funds for the purpose of getting someone else elected into office. Independent expenditures are limited to communications that expressly advocate the election or defeat of a clearly identified candidate.

By urging a certain view to the voters as to how to cast their votes, the candidate’s mailing could be said to “oppose” those candidates who are consigned to the second or third choices. This interpretation of “independent expenditure” and section 85501 has never, to our knowledge, been applied by the Commission. In fact, we have generally concluded to the contrary. In those instances, as discussed in the attached opinion, candidates including endorsements of other candidates or measures were found not to be making independent expenditures since the mailing was presumed to have been generated to benefit the mailing candidate’s own candidacy, if distributed exclusively within the mailing candidate’s own jurisdiction. In addition, a candidate is generally never prohibited from attacking his or her opponent in an “independent expenditure.”

Although the past advice discussed above has never been applied to the type of election used in San Francisco, the rationale employed suggests that a candidate could send a mailing urging his or her own election and ranking of other candidates if the mailer was done to benefit his or her own candidacy. If these types of mailings in a single-seat RCV race promote the mailing candidate’s own candidacy, even if this objective is achieved by urging a specific ranking of the candidate’s opponents, then section 85501 would not be applicable. For instance, if Candidate A knows that Candidate B is his strongest competition, he may send out mailers suggesting that the ranking for the top three be: 1) Candidate A; 2) Candidate C; and 3) Candidate D.

⁵ Where the mailing would be coordinated by the three candidates and paid for by only one, the mailings could be considered to be a contribution from the candidate who paid for the mailing to the other two candidates included in the mailing. By contrast, if the three candidates split the cost of the mailer proportionately, then no contribution would result. In order for there to be no contribution, each candidate would have to pay full and adequate consideration for his or her portion of the mailer.

Staff suggests that such communications in RCV races not be considered “independent expenditures” within the meaning of section 85501.

VI. Conclusion

Staff finds that the issuance of the draft opinion (Appendix 1) is the appropriate action to assist in the correct application of section 85501.

Attachments:

Appendix 1: Proposed Opinion O-04-226